United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

J. M. LEITER and FLOYD J. CAMPBELL,

Plaintiffs in Error,

vs.

THOMAS S. POINDEXTER,

Defendant in Error.

Brief of Plaintiffs in Error

Upon Writ of Error to the United States District Court of the District of Idaho, Central Division.

FORNEY & MOORE,
WILSON & NEAL,
Attorneys for Plaintiffs in Error.

C. J. ORLAND and J. T. BROWN,
Attorneys for Defendant in Error.

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STATEMENT OF FACTS.

This is an action brought to recover upon an instrument in writing, reading as follows:

"STOCKHOLDER'S PURCHASING CONTRACT.

Feb. 14, 1911.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347, owned by The A. C. Ruby Co., of Portland, Ore., and recognizing his value as a means of improving our horse stock, we the undersigned subscribers, hereby purchase said Stallion of the A. C. Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

$2800.00 Portland, Oregon, Feb. 14th, 1911.

For value received, I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty-eight Hundred Dollars, payable at the Merchants' National Bank, Portland, Oregon, in payments as follows:

One Thousand and 00-100 Dollars, Oct. 1st, 1911.

Nine hundred and 00-100 Dollars, Oct. 1st, 1912.

Nine hundred and 00-100 Dollars, Oct. 1st, 1913.

with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum of both principal and interest become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorneys fees.

THOS. S. POINDEXTER.

HENRY STROH."

Which instrument it is admitted was purchased by the plaintiffs in error prior to maturity and without notice and for value (Record, page 34).

Which instrument the plaintiffs in error, upon the trial, claimed and still claim is a negotiable promissory note. Upon the trial of the case the Court held that said instrument was not a negotiable promissory note (Trans. pp. 34-35), and that plaintiffs in error had no greater rights against the defendant than the original payee would have had if the action had been brought by the original holder, The A. C. Ruby Co., and refused to permit the plaintiffs in error to introduce in evidence testimony tending to show that they were bona fide holders of said instrument for value, and that they took it before maturity and without notice of any defenses thereto. And the Court in instructing the jury took from the jury the question whether plaintiffs were bona fide holders thereof and informed the jury that plaintiffs were not bona fide holders thereof (Transp. p. 150).

And refused to give the requested instructions of plaintiffs or to instruct the jury as to the rights of a bona fide holder of a negotiable instrument.

The jury returned a verdict in favor of the defendant in error, upon which the judgment, sought to be reversed, was entered.

SPECIFICATION OF ERRORS.

(Rule 24 Subd. 2b.)

As set forth in assignment of errors (Record pp. 198 to 206), these plaintiffs in error do now specify the errors upon which they intend to rely:

FIRST: The Court erred in refusing to permit the plaintiffs to offer in evidence and read to the jury the depositions of J. M. Leiter and Floyd J. Campbell, plaint-

iffs, and of the witness, A. C. Ruby, tending to show that the plaintiffs were **bona fide** holders of the note for value and that they took it before it became due without notice of any defenses thereto.

SECOND: The Court erred in instructing the jury that the instrument sued upon in this cause, reading as follows:

"STOCKHOLDERS' PURCHASING CONTRACT.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347, owned by the A. C. Ruby Co., of Portland, Ore., and recognizing his value as a means of improving our horse stock, we, the undersigned subscribers, hereby purchase said Stallion of the A. C Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

$2800.00 Portland, Oregon, Feb. 14th, 1911.

For value received I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty-eight Hundred Dollars, payable at the Merchants National Bank, Portland, Oregon, in payments as follows:

One Thousand and no 00 Dollars....Oct. 1st, 1911.

Nine Hundred and no 00 Dollars....Oct. 1st, 1912.

Nine Hundred and no 00 Dollars....Oct. 1st, 1913.

with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorneys fees.

THOS. S. POINDEXTER,
HENRY STROH."

was not a negotiable promissory note.

THIRD: The Court erred in instructing the jury as shown by the instructions given by the Court (Record, p. 150), as follows:

"**Sometimes where an instrument is in what we call a negotiable form, as a check or ordinary promissory note, the transfee of such instrument has rights greater than the payee but, for certain reasons which are unnecessary to explain you, I have held as a matter of law that this is not a negotiable instrument in the sense that the purchaser of it has greater rights than the payee and therefore I say to you that the plaintiffs here stand in the shoes of A. C. Ruby, and have just as much right as he would have had if it had never been transferred, but no greater right.**"

for the reason that said instructions took from the jury the question whether the plaintiffs were bona fide holders of the note sued upon, and informed the jury that the plaintiffs were not **bona fide** holders thereo.

FOURTH. The Court erred in refusing to give the following instruction No. 1 (Record, p. 156), requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

"A negotaible instrument is a contract in writing whereby one or more persons promise to pay to the order of one or several persons a definite sum, at a future time named in the instrument, and, under this rule the note sued on in this action is a negotiable promissory note, and you should so regard it."

FIFTH: The Court erred in refusing to give the following instruction No. 2 (Record, p. 157), requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

"A holder in due course is one who, for a valuable consideration, before maturity, takes such an instrument under the following conditions:

1. It must be complete and regular upon its face, and I instruct you that this note is such an instrument.

2nd. He must have become the holder before the note was overdue, and, if you find the plaintiffs are such holders, they did become such before it was overdue.

3rd. They must have taken it in good faith, and for value, as to this, if the plaintiffs had no notice that the defendant claimed fraud in the execution of the note, before they took the note from the A. C. Ruby Company, it would make no defense that you may find, as a matter of fact, that there was fraud in the securing of the note from the defendant by The A. C. Ruby Company or its agents. Under such circumstances, plantiffs would take the note as holders in due course. If you find that the plaintiffs are the holders of the said note in due course, then the fact that the defendant may have been induced to sign the note, through the misrepresentations he has testified to, would not discharge him from liability on the note as against the plaintiffs here, for, if the defendant had an opportunity to read the note, and failed in that regard, if he failed to investigate—to observe—to ascertain what the instrument was, in the hands of the plaintiffs, if you find that plaintiffs are holders in due course, for value, defendant cannot be held to defend against it.

4. At the time the note was negotiable, plaintiffs must have had no notice of any infirmity in this note. If you find that the plaintiffs are such holders of the note, then the fact that the defendant might have been induced to sign the note, through the misrepresentations he has testified to, would not discharge him from liability as against plaintiffs."

SIXTH: The Court erred in refusing to give the following instruction No. 3 (Record, p. 158), requested by plaintiff, for the reason that the said instruction is not embraced within the Instructions of the Court, and is further based upon the facts in the case, viz.:

"One who takes negotiable paper, before maturity, for value, is entitled to recover against the maker, unless it is shown that, in the transaction by which title was acquired, the endorsee had knowledge of facts which would render the same invalid against the maker, or was guilty of bad faith, and the burden of proving such knowledge or bad faith is upon the defendant."

SEVENTH: The Court erred in refusing to give the following Instruction No. 4 (Record, p. 158), requested by the plaintiff, for the reason that said instruction is not embraced within the instructions of the Court and is further based upon the facts in the case, viz.:

"The title to a negotiable promissory note passes by endorsement, and one who takes a negotiable promissory note by endorsement, before maturity, for a valuable consideration, in the regular course of business, without notice of infirmities, is called a holder in due course, and is entitled to collect it of the maker, even though the maker might have a good and valid defense against the original payee of the note."

EIGHTH: The Court erred in refusing to give the following Instruction No. 5 (Record, p 159), requested by the plaintiffs, for the reason that said instruction is not embraced within the Instructions of the Court, and is further based upon the facts in the case, viz.:

"If you find from the evidence that when Campbell and Leiter received the note made by the defendant, a copy of which is set forth in the complaint herein, in

favor of the A. C. Ruby Company, they knew of nothing to apprise them, or put them upon inquiry with respect to the claim now made by the defendant that said note was given without consideration, or procured by fraud, your verdict should be for the plaintiffs for the full amount sued for."

NINTH: The Court erred in refusing to give the following Instruction No. 6 (Record, p. 159), requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

"As to what notice of the infirmity of the note the plaintiffs should have had, I charge you that they must have had actual notice of some defect in the instrument. It is not sufficient to defeat their claim that they are holders in due course to show simply suspicious circumstances. You must be able to find from the evidence that plaintiffs did know—had actual notice—of the fraud claimed before you can consider the defense which the defendant imposes regarding the fraudulent character of the transaction by which the defendant claims he was induced to sign the note."

TENTH: The Court erred in refusing to give the following instruction No. 7 (Record, p. 160), requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

"I instruct you that nothing contained in the note itself would in any way be notice to plaintiffs of any infirmity in the note."

ELEVENTH: The Court erred in refusing to give the following Instruction No. 8 (Record, p. 160), requested by the plaintiffs, for the reason that said instruction

is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

"It is the part of ordinary prudence for one who is asked to sign a contract, or obligation relating to business matters of importance, to investigate, and failure to do so, to read when opportunity is given to read, to look when opportunity is afforded to look, to examine when the instrument is submitted for examination, precludes the defense that the paper is not what the signing party understood it to be, when that paper is put into circulation and falls into the hands of an innocent holder.

And on the facts in this case, if you find the plaintiffs are holders in due course, and for value, as I have defined those terms, then plaintiffs are entitled to recover the full amount of the note with interest, and such further amount as you may find to be a reasonable attorney's fee, whatever might have been the result if the action had been between the original parties to it, namely, been brought by the A. C. Ruby Company, to whom the note was given."

TWELFTH: The Court erred in refusing to give the following Instruction No. 9 (Record, p. 151), requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

"One who purchases a negotiable note for value, before maturity, does not owe the maker the duty of making active inquiry into the origin or consideration of the note before purchasing the same. The purchaser's right to recover can only be defeated by showing that he had actual notice of the facts which impeach the validity of the paper."

THIRTEENTH: The Court erred in refusing to

give the following Instruction No. 10 (Record, p. 169), requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

"If you find the plaintiffs took this note, before maturity, for value, then they are entitled to recover against the defendant, unless you shall find from the evidence that it has been shown in the transaction between plaintiffs and A. C. Ruby, by which plaintiffs acquired title to the note, that the plaintiff had knowledge of facts which would render the same invalid as against the defendant, or unless you find that the plaintiffs were guilty of bad faith in taking said note, and I instruct you that the burden of proving such knowledge, or bad faith, is upon the defendant."

AUTHORITIES.

The note sued upon was clearly a negotiable promissory note.

Lord's Oregon Laws, Sections 5834, 5835, 5836, 5837, 5868.

Remington-Ballanger's Codes and Statutes of Wash., Sections 3392, 3393, 3394, 3395, 3396.

Negotiable Instrument Act, Sections 1, 2, 3, 4, 5.

Ireland v. Sharpenberg, 103 Pac., 801, 54 Wash., 558;

Chicago Railway Equipment Co. v. Merchants Nat'l Bank, 136 U. S., 268, 34 (L. ed.) 349;

Zellman v. Jackson, 238 Ill., 290;

United States National Bank v. Floss, 38 Or., 68;

Siegel v. Chicago Trust & Sav. Bank, 131 Ill., 569, 23 N. E., 417;

First Nat'l Bank v. Michael, 1 S. E., 857 (N. C.);

State Nat'l Bank v. Cason, 2 South, 881;
7 Cyc, page 948.

ARGUMENT.

(Rule 24 Subd. 2c.)

POINTS OF LAW AND FACTS DISCUSSED.

The question to be determined is whether the note sued upon is negotiable (all of the assignments of error from 1 to 13, inclusive, go to the presenting of this one question).

The only contention made upon the trial that the note sued upon was not a negotiable instrument was based solely upon the words appearing at the beginning thereof to-wit:

"STOCKHOLDERS' PURCHASING CONTRACT.

Feb. 14, 1911.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347, owned by The A. C. Ruby Co., of Portland, Ore., and recognizing his value as a means of improving our horse stock, we, the undersigned subscribers, hereby purchase said stallion accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto."

The remaining portion of the note being as follows:

"$2800.00 Portland, Oregon, Feb. 14, 1911.

For value received, I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty-eight Hundred Dollars, payable at the Merchants National Bank, Portland, Oregon, in payments as follows:

One Thousand and no 00 Dollars..Oct. 1st, 1911.

Nine Hundred and no 00 Dollars, Oct. 1st, 1912.

Nine Hundred and no 00 Dollars, Oct 1st, 1913.

with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and collectible at the option of the holder thereof, and in case suit or action is instituted to collect payment I agree to pay a reasonable attorney's fees.

THOS. S. POINDEXTER,
HENRY STROH."

It is contended by defendant that the words at the beginning of the note make the note non-negotiable under Section 5 of the Negotiable Instrument Act, which section has been adopted in Oregon and Washington.

Section 5 of the Negotiable Instrument Act provides:

"An instrument which contains an order or promise to do any act in addition to the pyament of money is not negotiable; but the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturty; or (3) waives the benefit of any law intended for the advantage or protection of the obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall

validate any provision or stipulation otherwise illegal.''

The contention of plaintiffs in error is that said provision does not in any sense contain an order or promise to do anything in addition to the payment of money. The only thing the defendant is required to do is to pay the sum of twenty-eight hundred, interest and attorney's fees in case of suit.

The most unfavorable construction that can be placed upon it is that it shows that the obligors examined and purchased a stallion from The A. C. Ruby Co., the record showing (Exhibit A, Record, p. 178) that at the same time and date they received a bill of sale for the stallion, which was admitted in evidence and was admitted to be genuine. So that the words at most can only be held to show the consideration for which the note was given, or as showing the transaction out of which it arose.

The payment of the money provided to be made is not rendered in any way uncertain, either as to time of payment or the amount to be paid, nor is payment in any way rendered conditional.

In the case of Ireland v. Sharpenberg, 103 Pac., 801, 54 Wash., 558, which was action upon a note given for purchase of a stallion, the note sued upon contained at the top the following words:

''Stockholders Purchasing Contract.

No. 910. Spokane, Wash., May 7th, 1906.

After a good and satisfactory examination of the Belgian Stallion named Jules D'Or 1635, No. (25894), owned by the Burgess Importing Co., of Wenona, Illinois, and recognizing his value as a means of improving our horse stock, we, the undersigned subscribers, hereby purchase said stallion of the Burgess Import-

ing Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

Capital Stock, $3200.00 Shares, $400.00 each."

With the exception of the words "Capital Stock $3200.00; Shares $400.00 each," the first part of the note is substantially the same as the note in question here.

The defendants being sued upon the note by a bona fide purchaser thereof, offered in evidence the portion of the note above set forth, which had been detached, the lower court refusing to permit its introduction. The Supreme Court of the State of Washington, in the above case, held that the defendants should have been allowed to introduce said portion of said note in evidence, the Court saying:

> "We have referred to the part of the writing which was detached from the note before assignment. This slip was offered in evidence by appellants (defendants) and admitted, and afterwards by the Court stricken out upon motion of respondents' attorneys, which is claimed by appellants as error. It seems to us that appellants were entitled to have this slip in evidence, since it constitutes a part of the original transaction, **and shows the consideration for which the note was given.**"

And the Court further say, page 804 of the Pacific Reporter last above referred to:

> "We are of the opinion that the appellants were entitled to have the question of good faith of the respondents in the purchase of the note submitted to the jury together with the question whether or not it was originally obtained by fraud and that neither of

these questions, in the light of this record, could be determined by the Court as a matter of law."

We contend in this case that the first part of the note sued upon merely shows what was the consideration for the note. And the law is well settled that this would not make the note non-negotiable.

"A recital in a promissory note which destroys its negotiability must be of a kind that in some respect qualifies or makes uncertain or conditonal the promise."

Zollman v. Jackson, 238 Ill., 290.

In the case of Chicago Railway Equipment Co. v. Merchants National Bank, 136 U. S., 268, 34 (L. ed.) 349, the Court held a note to be negotiable, which reads as follows:

"$5000 Chicago, Ill., January 20 ,A. D. 1884.

For value received, four months after date, the Chicago Railway Equipment Company promise to pay to the order of the Northwestern Manufacturing and Car Company of Stillwater, Minnesota, five thousand dollars at First National Bank of Chicago, Illinois, with interest thereon at the rate of —— per cent per annum from date until paid.

This note is one of a series of twenty-five notes, of even date herewith of the sum of five thousand dollars each, and shall become due and payable to the holder on the failure of the maker to pay the principal and interest of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred and fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13,000 to 13,349, inclusive, and marked on the side thereof with the words and letters 'Blue Line, C. &

E. I. R. R. Co., and it is agreed by the maker hereof that the title to said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all of said notes being equally and ratably secured on said cars.

No. 1. GEORGE B. BURROWS,
Vice-President.

Countersigned by E. D. Buffington, Treasurer.
Northwestern Manufacturing and Car Co.,
Per J. C. Gorman, Treas."

The Court in deciding the case, say, page 284:

"Without deciding whether the notes here in suit would or would not be negotiable securities if the transaction between the parties had been a conditional sale, we are of the opinion that they are of the class of instruments that are negotiable according to the mercantile law, and which in the hands of a bona fide holder for value are protected against defenses of which the maker might avail himself if sued by the payee. They are promises in writing to pay a fixed sum of money to a named person or order, at all events, and at a time which must certainly arrive."

"The breach of an executory contract which is the consideration for a negotiable promissory note is not a defense at all against such note in the hands of an indorsee for value before maturity, even if he had notice of the contract, unless before purchasing he also knew of the breach."

United States National Bank v. Floss, 38 Or., 68.

In the case of Siegel v. Chicago Trust & Savings Bank 131, Ill., 569, 23 N. E., 417, the instrument sued on was as follows:

"Chicago, March 5th, 1887, On July 1st, 1887, we promise to pay D., or order, the sum of Three Hundred Dollars for the privilege of one framed advertising sign in one end of a certain number of the street cars of North Chicago City Railway Co., for a term of three months from May 15th 1887.

SIEGEL, COOPER & CO."

the court in holding the note to be negotiable say:

"But the question remains whether the statement, or recital of the consideration, on the face of the instrument, impairs its negotiability, and in this instance amounted to a conditon precedent. The mere fact that the consideration for which the note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee will not destroy its negotiability, unless it appears through the recital that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid."

The Court in First National Bank v. Michael, 1 S. E., 857 (N. C.), say:

"The mere fact that the particular consideration of the note is mentioned in it, and that it possibly might involve or give rise to equities between the parties to it, cannot prevent its negotiability by indorsement. To have this effect it must appear from reference to it in the note that it qualifies the promise to pay the sum of money specified and renders it conditional, or the amount to be paid uncertain."

In the case of State Nat'l Bank v. Cason, 2 South, 881, at page 882, the Court say:

"It cannot affect the negotiability of a note that

its consideration is to be hereafter realized, or that from some contingency it may never be enjoyed."

By the decided weight of authority the recital in a note of the consideration for which it was given is not of itself sufficient to apprise a purchaser of the failure of the same or to put him on inquiry concerning such failure.

7 Cyc., page 948.

Section 1 of the Negotiable Instrument Act, which has been adopted in Oregon and Washington (Section 5834 Lord's Oregon Laws; Section 3392 Remington & Ballanger's Code), defines what it takes to constitute a negotiable instrument, as follows:

> "An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand, or at a fixed or determinable future time; (4) must be payable to order or to bearer; and (5) where the instrument is addressed to a drawee, he must be named or otherwise indicated therein within reasonable certainty."

Section 2 of the Negotiable Instrument Act, which has been adopted in Oregon and Washington (Section 5835, Lord's Oregon Laws, and Section 3393, Remington & Ballanger's Code), provides:

> "The sum payable is a sum certain within the meaning of this act, although it is to be paid (1) with interest; or (2) by stated installments; or (3) by stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due; or (4) with exchange, whether at

a fixed rate or at the current rates; or (5) with cost of collection or an attorney's fee, in case payment shall not be made at maturity."

Section 3 of the Negotiable Instrument Act, which has been adopted in Oregon and Washington (Lord's Oregon Laws, Section 5836, and Remington & Ballanger's Code, Section 3394), provides:

"An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) **a statement of the transaction which gives rise to the instrument.** But an order or promise to pay out of a particular fund is not unconditional."

Section 4 of the Negotiable Instrument Act, which has been adopted in Oregon and Washington (Lord's Oregon Laws, Section 5837, and Remington and Ballanger's Code, Section 3395), provides:

"An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable and the happening of the event does not cure the defect."

The note in question here conforms to every requirement necessary to constitute a negotiable instrument under the foregoing sections of the Negotiable Instrument Act, or under the Law Merchant, viz: It is in writing;

signed by the makers; contains an unconditional promise to pay a sum certain in money at a fixed future time, and is payable to order of the payee. Nothing more is required.

The mere fact that the note contains a statement of the transaction which gave rise to it does not in any way make it non-negotiable, because Section 3 of the act expressly provides that the promise to pay is unconditional even though it contains "**a statement of the transaction which gives rise to the instrument.**"

For the foregoing reasons the writ of error should be allowed and the judgment of the said district court be reversed.

FORNEY & MOORE,
WILSON & NEAL,
Attorneys for Plaintiff in Error.